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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 14 TOUCHSCREEN GESTURES LLC,

15 Plaintiff,

16 vs.

17 GOOGLE INC.,

18 Defendant.

19 Case No. 3:13-cv-02478-WHA

20 **GOOGLE'S RESPONSE TO
21 PLAINTIFF'S PRÉCIS REQUESTING
22 PERMISSION OF COURT TO FILE
23 MOTION FOR LEAVE TO AMEND
24 COMPLAINT, INITIAL
25 DISCLOSURES, AND
26 INFRINGEMENT CONTENTIONS**

27
28 Defendant Google Inc. ("Google") respectfully responds to Plaintiff Touchscreen Gestures LLC's ("Touchscreen's") précis (ECF No. 59), opposing Plaintiff's request for approval to seek leave to amend its initial disclosures and infringement contentions, but agreeing to its filing of an amended complaint if certain modifications are made to reflect the parties' agreement as to the paring of Touchscreen's claims.

29 On August 16 and September 4, the parties discussed the deficiencies in
30 Touchscreen's original and proposed amended complaint, initial disclosures, and
31 infringement contentions and reached agreement as to some issues, such as
32 Touchscreen's confirmation that: (1) it will no longer pursue any allegations related to
33 U.S. Patent No. 7,274,357 or the Motorola Atrix or Droid 3 phones, (2) it will not
34 pursue allegations of indirect infringement or joint infringement, and (3) it will
35

1 withdraw its request for enhanced damages. On September 10, Google confirmed those
2 agreements in writing as well as its positions on the fundamental disputes that remain
3 as to the issues outlined below in writing.

4 **I. Touchscreen's Request to Amend its Complaint**

5 While Google does not object to Touchscreen's request to amend its First
6 Amended Complaint (D.E. No. 41) to remove the willful infringement claims from the
7 Prayer for Relief and the allegations of infringement of U.S. Patent No. 7,273,357, the
8 Atrix 4G Phone and Droid 3 Phone from the Complaint, those claims should be
9 dismissed by this Court with prejudice and Google sent Touchscreen a draft of a
10 proposed order to that effect on September 10. Touchscreen did not respond before
11 filing its précis. Moreover, Touchscreen has agreed not to pursue any allegations of
12 indirect or joint infringement, and Touchscreen's proposed amended complaint should
13 be modified to reflect that agreement by replacing the references to infringement
14 generally in paragraphs 8-10, 13-15, 18-20 and 23-25 as well as subparagraphs A-C of
15 the Prayer for Relief with references to direct infringement only. If those additional
16 steps are taken, Google will not oppose Touchscreen's motion for leave to file the
17 amended complaint.

18 **II. Touchscreen's Futile Request to Amend its Initial Disclosures**

19 It is misleading for Touchscreen to characterize its proposed supplemental
20 damages disclosures as merely providing "more specificity regarding its computation
21 figures," (ECF No. 59 at 3), since Touchscreen disclosed no calculation at all in its
22 initial disclosures on July 19. Despite this Court's prior order in *Brandywine Comms.*
23 *Techs., LLC v. Cisco Systems, Inc.*, Case No. C 12-01669 WHA, and instructions at the
24 July 11, 2013 Case Management Conference, Touchscreen's initial disclosure of its
25 basis for calculating damages was essentially limited to a statement that it was seeking
26 a reasonable royalty and a regurgitation of the *Georgia-Pacific* factors. Notably absent
27 was any indication of a per unit (or other) royalty that Touchscreen considered

1 reasonable, any description of discovery Touchscreen needed to support its reasonable
2 royalty calculation, or any description of Touchscreen's diligent efforts to acquire that
3 information independently. Damages are likely to be hotly contested in this case, since
4 Google's Android operating system, the gesture detection features of which
5 Touchscreen suggests *may* be the basis for its infringement contentions, is open-source,
6 and provided gratis for public use.

7 These deficiencies are not overcome by Touchscreen's proposed supplemental
8 initial disclosures, which simply apply an arbitrary 1% running royalty to the entire
9 revenue base it associates with the accused Samsung Google Chromebook and Google
10 Nexus 7 products. As an initial matter, Touchscreen does not explain why it chose not
11 to include this calculation in its original disclosures, since all of the information it is
12 based upon appears to have previously been available to Touchscreen. Touchscreen's
13 undue delay aside, its belated royalty calculation fails to disclose fundamental
14 information, such as the portion of the royalty attributable to each of the asserted
15 patents, or Touchscreen's basis for applying that royalty to the revenue for the entire
16 accused product rather than a portion associated with the allegedly infringing features.
17 The Court should not entertain Touchscreen's motion for leave to supplement its
18 damages disclosures, because its supplemental disclosures are untimely and even still
19 fail to comply with discovery obligations Touchscreen was well aware of before it
20 served its initial disclosures.

21 **III. Touchscreen's Futile & Bad Faith Request To Amend its Infringement
22 Contentions**

23 Rather than pointing out the relevant features of the accused products in its
24 original infringement contentions, as required under Patent L. R. 3-1(c), Touchscreen
25 only cites to apparently irrelevant third party information that does not reflect the
26 attributes of the accused Google products. For example, in its claim charts for the
27 accused Samsung Google Chromebook, Touchscreen cites to the "Synaptics PS/2

1 TouchPad Interfacing Guide,” even though the accused device, of which Touchscreen
2 has a sample, does not include a Synaptics PS/2 TouchPad.

3 Similarly, rather than pointing to the source code for Google’s Android
4 operating system, which is **publicly available**, Touchscreen’s original claim charts for
5 the Google Nexus 7 accused product arbitrarily point to source code on the website of
6 an unrelated third party (Badlogic Games) that has no relation to Google. While
7 Touchscreen’s proposed “amended” claim charts for the Google Nexus 7 now cite to
8 Android source code, Touchscreen has not explained why it could not have cited this
9 source code originally. Moreover, even Touchscreen’s amended charts suffer from
10 internal inconsistencies and glaring omissions that make amendment futile. Under
11 these circumstances, Google should not be required to slog through the whole of
12 discovery before Touchscreen’s unsupported infringement claims can be put to rest.

13 Touchscreen’s allegation that the Synaptics PS/2 TouchPad technology is
14 infringing is also tantamount to a concession that the asserted claims of the ’506, ’031,
15 and ’575 patents are invalid, since that very **same technology is prior art**. Putting aside
16 the fact that none of the accused products appear to actually use a Synaptics PS/2
17 TouchPad, an earlier version of the same interfacing guide Touchscreen cites in its
18 claims charts has been publicly available since at least January 22, 2001, which
19 predates the filing of the earliest applications for these patents by almost three years.
20 Thus, without needing to resolve any questions of claim construction or factual disputes
21 concerning the teachings of this prior art, Touchscreen’s contention that the prior art
22 PS/2 TouchPad is covered by the asserted claims of these three patents confirms
23 beyond dispute that those same claims are invalid as anticipated. *See Atlas Powder Co.*
24 v. *IRECO Inc.*, 190 F.3d 1342, 1346 (Fed. Cir. 1999) (“[I]f granting patent protection
25 on the disputed claim would allow the patentee to exclude the public from practicing
26 the prior art, then that claim is anticipated”). Consequently, this Court need not
27 entertain Touchscreen’s request to belatedly amend infringement contentions that are

1 ultimately futile in light of the conceded invalidity of the asserted claims. Rather, if
 2 Touchscreen will not agree to withdraw its claims that these three patents are infringed,
 3 this Court should bar Touchscreen from asserting infringement of the '506, '031 and
 4 '575 patents and allow Google to seek early summary judgment that the asserted claims
 5 of these three patents are invalid as anticipated.

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7 Dated: September 16, 2013

By: /s/ Charanjit Brahma

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2013, the foregoing
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CONTENTIONS** was served on the following counsel of record by the Court's ECF
system.

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